

FOR ARGUMENT

No. 87-1387

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

October Term, 1988

WARDS COVE PACKING COMPANY, INC.,
CASTLE & COOKE, INC.,

Petitioners,

v.

FRANK ATONIO, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents' brief is dominated by two recurring themes: a refusal to acknowledge or appreciate the District Court's fact-finding role and a disregard of the principles used to measure disparate impact. Respondents opt, instead, for an exhaustive re-argument of the facts as if the clearly erroneous rule did not exist and they assume that mere proof of imbalance in an employer's work force establishes an un rebuttable case of disparate impact.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents' densely packed brief presents a misleading factual picture. To avoid the heavy burden placed on them under the clearly erroneous rule,¹ respondents simply ignore the findings and point only to evidence favorable to their case. This case is before this Court, however, not on a review of a summary judgment but after a trial has been conducted.

¹ *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Respondents do state there was no evidence that rehiring a satisfactory worker in the same job the next season was necessary. Resp. Br., p. 14. Not even the Ninth Circuit agreed with respondents on this. Pet. App. III:56, VI:32, 33.

The superficial appeal of respondents' evidence was found collectively by the District Court to provide an inference of intentional discrimination. That inference disappeared when the court considered petitioners' evidence. The error of the Court of Appeals occurred when it considered this same inference created an un rebuttable presumption if the impact model were used. Pet. App. VI:18.

1. Hiring Practices.

Respondents persistently mischaracterize the practices as "racially segregated."² The label does not make it a fact. The trial court found the practices were not racially motivated, were not a pretext for intentional discrimination, and the Ninth Circuit affirmed on this issue.³ While respondents continue to insinuate that petitioners used Local 37 out of racial motivation, they lost that argument in both courts below.

A. Hiring for At-Issue Jobs.

Respondents do not dispute that petitioners hired many nonwhites in at-issue jobs — including at the highest levels.⁴ Petitioners collectively employed 24% nonwhites in these at-issue jobs. Respondents concede the relevance of these hiring results. (Resp. Br., p. 8, n. 10.)

² The term "segregate" conjures visions of racial patterns in the southern United States. It simply does not apply to petitioners. Being unfamiliar with the record, the *amicus* briefs in support of respondents are infected with the same rhetoric.

³ Pet. App. I:119, 129, 130. Moreover, this Court denied respondents' Petition for Writ of Certiorari (No. 87-1388) on this issue and denied their Motion for Rehearing. Those rulings should not be disturbed.

⁴ E.R. 13 (790 nonwhite hires); R.T. 2862; J.A. 159 (director, vice president, superintendent).

Respondents' real argument is that petitioners should have hired 50% minorities in at-issue jobs and should have either targeted Local 37 as a source for these jobs and/or trained people for at-issue jobs.

B. Local 37.

Petitioners used Local 37 as a source of nonresident cannery workers simply because it held the contract. R.T. 1128. Respondents now contend that the union has no formal role in selecting employees. The facts and the findings are otherwise. The cannery worker foreman⁵ first determines who has a rehire preference, and the remaining employees (except for egg house workers)⁶ are designated by the union president. R.T. 1127, 1128.

None of the respondents were channeled by management into cannery worker jobs. Rather, each testified that he originally went to Local 37 to seek employment in the canneries.⁷ The District Court found that management does not direct any cannery worker foremen to line up members of any race. (Pet. App. 1:33.)⁸ Respondents do not mention these important findings.

⁵ While the union contract does state the cannery worker foreman is a company representative (see Local 37 contract in Ex. A-1 through A-11), Dr. Rees explained that this is a common provision in union contracts to avoid Taft-Hartley implications; that the person named on management payroll was acceptable to the union; and that his decisions were agreeable to the union. R.T. 1967, 1968.

⁶ Some of the egg house workers are hired by management because of the union's refusal to fill those positions. Perhaps as a carry-over from World War II, the Filipino males refuse to work in the egg house with Japanese nationals without payment of overtime. R.T. 1128.

⁷ R.T. 46 (Kido); R.T. 76 (Atonio); R.T. 874 (Bacilig); R.T. 956 (C. Lew); R.T. 205 (Kuramoto); R.T. 1042 (Arruiza); R.T. 1057 (R. del Fierro); R.T. 2222 (A. Lew). See R.T. 160 (Della); R.T. 202 (Pascua); R.T. 795 (Daba) (class member witnesses).

⁸ Petitioners cite a letter from the Alitak cannery worker foreman Fred Wong (Ex. 394), who said he could recruit whites or blacks if directed. Wong was concerned because of this suit that Local 37 would supply too many Asians. (R.T. 3122.) In line with company policy, he was never directed to do so and the District Court so found. Pet. App. I:33.

C. The "Lock-In" Argument.

Respondents contend that cannery workers are locked in or tainted by the fact that they are hired as cannery workers. They imply that cannery workers are cut off from other jobs. However, at the end of the season all employees complete their jobs and become part of the overall labor supply available for at-issue jobs. The District Court found that none were deterred, that all applicants were evaluated on job-related criteria, that employees and non-employees are free to apply for any job and that similarly situated applicants are treated equally.⁹ Many did apply, including respondent Atonio, and were hired.¹⁰ The statement "What's wrong with being in the Filipino crew?" quoted by respondents (Resp. Br. 15) was flatly denied by its alleged author. (R.T. 2816.) Respondents also do not mention the finding that there has been a general lack of interest by cannery workers in applying for non-cannery worker jobs. (Pet. App. I:40.)

There are also substantial business reasons why petitioners do not promote during the season, and the finding (and supporting evidence) that there is a lack of time to train during the season is unchallenged. (Pet. App. I:19, 34, 46.) Thus, it is clear that both by necessity and by choice these employers do not promote from within.¹¹

⁹ Pet. App. I:33, 122, 123.

¹⁰ Filipinos and other minorities are not "channeled" into Local 37 cannery worker jobs. Those who actually apply for at-issue jobs are hired in those jobs when qualified for an existing opening, rather than being sent to Local 37. See, e.g., R.T. 2715-16; J.A. 159-60; R.T. 2889; J.A. 614; R.T. 2833. Minorities who have worked as part of the Local 37 crew and have applied for at-issue jobs in the off season have been hired in those jobs. See Pet. App. I:88 (Peters, a/k/a Atonio); J.A. 463-64; R.T. 2771-72.

¹¹ Respondents argue that Ex. 614 shows promotion discrimination, but the trial court found otherwise. Moreover, this exhibit only accounted for a minute portion of the jobs filled at the five canneries combined and did not address the issues presented.

D. Hiring in Alaska.

Respondents argue that petitioners targeted villages in Alaska for racial reasons.¹² The hiring patterns in Alaska were dictated by geography, as the District court found. (Pet. App. I:38, 39.)¹³ The bush country in Alaska, which is dominated by Alaska Natives, is an area of no roads and no telephones; it is sparsely populated; and there is no public transportation other than air strips (J.A. 481-485). Bush pilots may have the ability to hire unskilled workers but have no idea as to the requirements for other jobs (R.T. 1125). Petitioners also tap Alaska sources for cannery workers that because of geography are heavily white, e.g., the cities of Kenai and Ketchikan and the Air Force base at King Salmon in Bristol Bay. (Pet. App. I:38-39; E.R. 16; J.A. 617.)

The companies hired relatively few employees for any at-issue jobs from Alaska (probably because of its distance from the hiring centers in Seattle and Astoria), but to the extent they did, Alaska Natives received the vast majority of the jobs. Pet. Br., p. 8, n.13. Certain areas of Alaska do provide skilled workers, such as the native boat building community on Kodiak Island which is tapped by the CWF Port Bailey and Alitak canneries. (R.T. 1126.)¹⁴

¹² Resp. Br., p. 7.

¹³ Respondents make much of the recruitment of unskilled workers in the Alaska Native villages and imply that the practice had a significant role in recruiting new cannery workers. Resp. Br., pp. 7-10. In fact, Wards Cove never used the practice; at Red Salmon only 5% of the new cannery workers hired 1971-80 were Alaska Native (17/338); and at Bumble Bee (South Naknek) only 17% of the new cannery workers were Alaska Natives (129/767) and, of those, three-fourths were hired 1971-73, at which point Bumble Bee decided not to use the practice any longer. Ex. A-403, Tbl. 1, 2, 5 row "cannery worker"; Ex. A-64 (Bumble Bee employees, years 1971-80); See E.R. 16; R.T. 1515-1516. At Red Salmon 11% of the new hires in at-issue jobs were Alaska Natives; at Bumble Bee they were 10%. E.R. 11,12.

¹⁴ Many of the Alaska Natives hired in the at-issue jobs came from the very villages where some of the bush pilot recruiting took place.

(footnote continued on following page)

Geography also takes some potential employees out of consideration. For example, all fishermen at Ekuk cannery have been independent¹⁵ since 1959 (R.T. 2437). Most native fishermen prefer the Nushagak River in Bristol Bay because of its longer, more consistent run and the presence of King salmon (R.T. 2436, 2437). Thus, they fish at Ekuk, which is located on that river, rather than being available as company (employee) fishermen at Naknek (Red Salmon, Bumble Bee). (R.T. 1142.)¹⁶ In addition, there was substantial evidence that many Alaska residents prefer fishing to cannery work. (R.T. 2437, 2347-48, 1141-42.)

E. Labeling.

The District Court reviewed the instances of race labeling and found that, although not laudable, it did not deter minorities in employment. (Pet. App. I:123.) Respondents have pointed to every instance of labeling in the ten-year case period. Much of it, as the District Court found, is not as sinister as might appear.¹⁷ The "native cook" at Bumble Bee was white. (J.A. 623.)

See, e.g., Exhibit 309 (employees Nos. 2, 6, 8, 16-20, 25-26, 31, 34, 35 are all Alaska Natives (Ex. A-65, pp. 767-770); Ex. A-382 (Tbl. 1 Ekuk) (showing residence of 100 Alaska Natives among "all hires" in at-issue jobs over a six-year sample period). Indeed, respondents themselves presented application exhibits for at-issue jobs from Alaska Native villages. Exs. 693, 695. Many Alaska Natives were hired in the at-issue jobs at all the remote canneries. Ex. A-403, Tbls. 2-5, Col. "Ak. Nat."

¹⁵ Independent means they are not employees but are in business for themselves (R.T. 2436, 2473). Their earning potential is considerably higher than that of the cannery superintendedent. *Id.* Respondents omit that the letter they cite as nepotism evidence (Ex. 464, Resp. Br. p. 9) was referring to a job with an independent fisherman at Ekuk. (R.T. 2436-37.)

¹⁶ Seventeen natives fished as a group at CWF-Egegik as company fishermen; although hired by and counted as Red Salmon fishermen for accounting purposes, they do not show up in the comparative statistics. (R.T. 1142.)

¹⁷ Because most of the labeling was in internal company records, most class members would not have even seen it. Thus, respondents cited it as evidence of intent, not impact. Plaintiffs' [Respondents'] Final Argument, pp. 70-72.

Filipinos refer to themselves as such (J.A. 181); the Wards Cove Packing Co. president told the affirmative action representative (he was Filipino) to stop using the term "Filipino Bunkhouse," but he continued to use it anyway (J.A. 182). The "impossible" Eskimos referred to cannery workers who had just gone on strike for wages higher than the contract during one of the biggest salmon runs in 30 years (R.T. 1144). Alaska Natives commonly refer to themselves as "native" and have so labeled many of their organizations, e.g., Bristol Bay Native Corporation (J.A. 182); cf. Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U.S.C. § 1601 *et seq.* The "Japanese" were Japanese nationals, not United States citizens, employed not by petitioners but by the companies who purchased the salmon eggs. (R.T. 1128.)

2. Labor Supply.

Unquestionably, selecting the relevant labor market and resolving statistical conflicts are fact-finding functions. (Br. of Pet., p. 18.)¹⁸ Respondents profess shock that the District Court found the available labor supply is 10% nonwhite. They say that because half the employees hired are nonwhite, the labor supply *must be* 50% nonwhite. Resp. Br., pp. 16-18. This credibility argument was rejected by the District Court (Pet. App. I:35-42, 110-111)¹⁹ which believed Dr. Rees' theory. See, e.g., J.A. 268.

¹⁸ Respondents champion *appellate* fact finding on the labor supply issue. Resp. Br., p. 16 ("believed was relevant").

¹⁹ Respondents argue that their own labor market analysis should have been adopted by the District Court. Resp. Br., p. 16. Plainly, there was substantial evidence to support the trial court's rejection of respondents' theory on this hotly contested issue (see, e.g., testimony of Dr. Rees, J.A. 291-294; cross-examination of Dr. Flanagan, R.T. 2065-2116). Respondents omit the fact that Dr. Flanagan's theory was also rejected in the *Domingo* case that is cited so often in their brief. *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 433 (W.D. Wash. 1977). See Resp. Br., p. 29.

Dr. Rees did not "drop" the percent nonwhite from a starting point of "47% to roughly 10%." Resp. Br., p. 18. More appropriately, he started with an unweighted civilian labor force that was from 92% to 96% white and, if anything, his adjustments raised, not lowered, the nonwhite availability percentage.²⁰ (J.A. 268-271; R.T. 1878.) The logical conclusion is that nonwhites, particularly Filipinos and Alaska Natives, receive disproportionately more, not less of available job opportunities.²¹

3. Skills.

Respondents contend that there should have been no skills adjustment to the statistics since (1) the jobs were unskilled and (2) petitioners' qualifications were subjective, and not shown to have been imposed. Resolution of this question does not change the result because the District Court found that the unskilled labor market was 90% white. (Pet. App. I:37.)²²

²⁰ Petitioners hired 83% of their employees from three states (Reply Br. App. I) where the civilian labor force is 96.3% white; it is 92% white if California is included. Reply Br. App. II. Moreover, Filipinos and Alaska natives, who combined were 88% of the class members (Ex. A-476), only made up a total of 4% of the civilian labor force in the overall geographical area drawn on by petitioners. See Reply Br. App. III; Ex. A-278-A-281, Labor Pool Tbls. 5b, 6b, 7b, 8b ("Everyone in Work Force"), Col. "All Depts." They were less than 2% of the population of Alaska, Washington, and Oregon combined. J.A. 295, 296; Ex. A-35, Tbl. 17 (at p. 32); Ex. A-36, Tbl. 17 (at pp. 39-41, 42); Ex. A-37, Tbl. 17 (at pp. 39-45, 46).

²¹ Despite these statistics, respondents still argue that white and nonwhites (i.e., Alaska Natives and Filipinos primarily), are available in equal numbers for all of the at-issue jobs. This rejected claim assumes that nonwhites are eight times more likely than whites to make themselves available for a job in the salmon canning industry and Filipinos and Alaska Natives combined are 17 times more likely than whites to be available for such jobs. See Reply Br. App. III.

²² The statistical labor market analysis incorporating the skills adjustment in the tables preferred by Dr. Rees is set forth in E.R. 2-9. In nine out of 13 at-issue job families (including at-issue combined), nonwhite availability was 10% or higher after making the skills adjustment. E.R. 8-9. Also see Ex. A-278, Tbl. 5, for each tab, cited at Pet. Br., p. 20, n. 29.

Nevertheless, both arguments are wrong and very carefully omit the fact that numerous witnesses testified and the court found that most of the at-issue jobs require prior skill and experience, whether expressly articulated or not, which petitioners sought in evaluating applicants.²³ The isolated instances of lesser qualified persons being hired cited by respondents (Resp. Br. 13) were not sufficient to overcome the evidence that supported the Court's findings.²⁴ *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 401, n.6 (2d Cir. 1981); *Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1379, n. 6 (5th Cir. 1974).²⁵

The court also found that the at-issue jobs were not fungible with the cannery worker jobs, that they required skills not readily acquired on the job, that petitioners needed experienced personnel in the jobs and hired on that basis, and that nearly all of the

²³ Pet. App. I:35, 45-47, 55-76, 112-123 (FF 104, 124, 126, 130, 134). See, e.g., R.T. 636, lns. 21-24; R.T. 1013, 1019-21; R.T. 2181-82; R.T. 2314-22; R.T. 2358-62, 2368-69; R.T. 2434-40; R.T. 2541-44; R.T. 2553-54; R.T. 2559-65; R.T. 2605-12, 2620-24; R.T. 2625-28; R.T. 2636-41; 2643-44; R.T. 2715-17; R.T. 2736-52; R.T. 2771-72; R.T. 2854-64; R.T. 2887-91, 2898-99; R.T. 2941-74, 2987-3002; R.T. 3153-58; Dep. of Robertson, pp. 3, 13-21 (following R.T. 3151); R.T. 3208-15; R.T. 3235-69; R.T. 3311-13, 3316-20; R.T. 1114-35, 1141-42, 1144-50; R.T. 1513-15.

²⁴ Respondents cite testimony of two tender engineers (J.A. 19-24, 60-62) but omit their cross-examination and other evidence. They worked on the one tender that was the best maintained in the fleet, and did not venture far from the cannery. One had significant prior skill, including engine overhauls. (R.T. 126-136; see also R.T. 780-790, 915-919). They also cite the "nephew" (Resp. Br. 13) who became a seamer machinist. His qualifications are shown at R.T. 705-740.

²⁵ Respondents' primary skills evidence was an industrial psychologist (Latham), who demonstrated a complete lack of knowledge of the requirements to operate a salmon cannery. For example, he opined that a tender could be safely and efficiently operated with a crew consisting of one skilled captain and three green deckhands (R.T. 2144), a crew held by another court to be unseaworthy. *Petition of New England Fish Company*, 465 F. Supp. 1003 (W.D. Wash. 1979). The District Court rejected his testimony at the close of evidence. (R.T. 2042.)

at-issue jobs required pre-existing skill and experience. Pet. App. I:35; 45-75.²⁶

Mr. DeFrance did not present "an entirely different set of qualifications" (Resp. Br. 12), but gave his opinion as to the skills and requirements necessary to do the jobs. That opinion (R.T. 2948-2974; J.A. 470-576) was evidence serving to corroborate petitioners' evidence and the District Court's findings that prior skill and experience, pre-season availability and fluency in English are all required. This was also corroborated by evidence in Exs. 68-72, petitioners' interrogatory answers on qualifications, introduced by respondents.²⁷

Respondents complain that the District Court did not state what "kind" of experience or skill was required for a number of jobs. Resp. Br., p. 12, n.13. This is a strained reading of the opinion. It is only common sense that when the judge (or a witness) says the carpenter job needs "substantial prior skill and experience," he means skill and work experience in carpentry, not as a bookkeeper, cook, or engineer.

4. Nepotism.

Respondents grudgingly concede that their nepotism tables involve double counting (Resp. Br. 38, n. 39). However, that is only one of the many flaws the District Court could consider in rejecting them (Pet. Br. 26), none of which respondents rebutted. There were other flaws, including counting relationships with non-employees, such as independent fishermen. Ex. 604.

²⁶ Although the A.C.L.U. does not agree (Br. p. 23), the unrebutted evidence was that prior truck driving experience was required for the set net pickup driver. Ex. 68, 71; Pet. App. I:108; R.T. 2965. To be "readily acquirable," the skill must be able to be learned within a matter of days. R.T. 1129, ¶ 58.

²⁷ E.g., Ex. 68 (qualification for a commercial fisherman is "experience"; for machinist is "skilled machinists and mechanics, welders and pipe

(footnote continued on next page)

5. Housing and Messing.

Respondents refuse to accept the District Court's finding that housing was not assigned on the basis of race, but on job crew and time of arrival. Resp. Br., pp. 19-20, 35-37.²⁸

Respondents also refuse to accept the finding that employees ate their main meals with their own crew and were not grouped only with persons of their own race. Resp. Br. pp. 20-21. Their citations solely to their own evidence of labeling and isolated instances or anecdotes are nothing more than an attempt to prove pretext, *Id.*, in which they failed. Pet. App. I:119.

fitters"; for carpenters is "skilled carpenters . . ."; Ex. 69 (qualifications for port engineer are "journeyman training and experience . . ."; for bookkeeper is "knowledge of accounting required"; for iron chink man, "mechanical experience required"); Ex. 71 (beach boss requires "experience and training in all phases of rigging, dock instruction, pile-driving, heavy equipment, equipment operation, salvage and maintenance"; for a baker, "considerable baking experience . . .")

²⁸ There is substantial evidence to support the trial court's findings. Workers are generally housed according to job department and time of arrival. Pet. App. I:83 (F.F. 149(a)); R.T. 1137-38, ¶¶ 79-84, 86; R.T. 2832, ¶ 20; R.T. 3273, ¶¶ 11, 13; R.T. 3275, ¶ 22; R.T. 2891, ¶ 20; R.T. 3168, ¶ 17. Minorities and whites in the same job categories are not segregated by race, but are housed together. R.T. 1137-38. The Filipino workers did not want their crew to stay with the Alaska Natives because they thought they were dirty and did not keep their quarters clean. (R.T. 2578.) See Ex. A-97-100. Workers in the at-issue jobs who arrive in the pre-season are housed together regardless of race. E.g., R.T. 3215-16, ¶ 36; R.T. 2360, ¶ 11; R.T. 2378-79, ¶¶ 40-44; R.T. 754-55; see R.T. 3333, ¶¶ 56-57; R.T. 2440; R.T. 2056; R.T. 3308. Minority and white male cannery workers are also housed together. R.T. 1082-83; R.T. 824, 827; R.T. 250, ln. 24 to R.T. 242, ln. 20. Similarly, minority and white female cannery workers are also housed together, rather than separately. E.g., R.T. 2212; R.T. 700; R.T. 701.

ARGUMENT IN REPLY

I. Proof of Work Force Imbalance Is Not and Should Not Be Dispositive Proof of Disparate Impact.

A. Work Force Imbalance is Not Per Se Discriminatory.

Respondents contend that work force imbalance statistics constitute an un rebuttable presumption of disparate impact, that an employer's evidence is not relevant to the impact assessment and that the District Court's resolution of the conflicting evidence is not a function of the trier of fact; in short, they contend that work force imbalance is *per se* impact and that the work force itself, not the labor market, is the sole measure of discrimination.

Title VII itself recognizes that imbalance is not equivalent to discrimination. 42 U.S.C. 2000e-2(j); *Watson v. Ft. Worth Bank & Trust*, 487 U.S.____, 108 S.Ct. 2777, 101 L. Ed. 2d 827, 843 (1988). To accept respondents' position would require the adoption of racial quotas, in this case 50% nonwhite in every job department. That balance would have to be maintained with new hiring. The employers could not draw from the external labor market without skewing recruitment to make sure that for every white hired a nonwhite was hired. This is not what Congress intended. *Id.* at 844.

Respondents simply ignore precedent holding that internal work force comparisons are to be rejected in favor of credible labor market evidence.²⁹ They mention neither the decisions of this Court and the circuit courts requiring consideration of petitioners' rebuttal evidence before determining the impact,³⁰ nor those holding that it is a fact-finding function of the trial court to determine the relevant statistical comparison.³¹

²⁹ Cases cited at Pet. Br. p. 20.

³⁰ Cases cited at Pet. Br. p. 17 and n. 23.

³¹ Cases cited at Pet. Br. p.20-21 and n. 31. *Accord*, *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 309-10 (7th Cir. 1988) ("especially where statistical evidence is involved, great deference is due the district court's determination...").

This is not a case like *Paxton v. Union Nat'l Bank*, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); or *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), where the employer trains and promotes from within.³² Nor is this case like *Carpenter v. Stephen F. Austin St. Univ.*, 706 F.2d 608 (5th Cir. 1983), where the employer intentionally assigned minorities to low level jobs which they could not change. 706 F.2d at 623-25.

In spite of respondents' incantations about "channeling," the facts here are that the at-issue jobs are filled first over a period of several months from an external labor market which includes all of the persons subsequently hired as cannery workers. Thereafter, the Local 37 dispatch is utilized.

Nor can respondents find solace in *Teal*,³³ which is directly at odds with their position. Resp. Br., pp. 21, 27. There, one stage of a multi-component test was shown to have impact and the defense of "bottom line" statistics rejected. Here, respondents cannot show any single causal effect, yet seek to challenge the entire selection system on their own "bottom line" statistics, while asserting petitioners cannot respond in kind.³⁴

³² *James* is explained by the Fifth Circuit in *Rivera v. City of Wichita Falls*, 665 F.2d 531, 541, n. 16 (5th Cir. 1982). *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982) cited at Resp. Br., p. 27, n. 26, simply held that crediting plaintiffs' applicant flow statistics was not clearly erroneous. 673 F.2d at 823. But *Payne* also rejected "bare work force statistics" on plaintiffs' claim of discrimination in initial job assignments. *Id.* at 824-25. Using these decisions is an attempt to pound a square peg into a round hole.

³³ *Connecticut v. Teal*, 457 U.S. 440 (1982). The United States in its brief, p. 22, suggests that certain multi-component selection devices may be challenged or defended as a whole.

³⁴ The remaining cases cited by respondents are inapposite. *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 579 (1978), is taken out of context. There, the court stated an individual claim could not be rebutted by proportional representation statistics. Neither *New York Transit*

(footnote continued on next page)

Respondents contend that the District Court made errors of law in arriving at its findings, but then they proceed to argue the facts. Resp. Br., pp. 30-31. They state that there are cases where recruitment from heavily white sources can distort the labor market,³⁵ but cannot show distortion in this case. Dr. Rees used the large population areas from which petitioners draw their sources. The trial court's acceptance of this careful analysis is a factual finding.

B. Policy Considerations Strongly Disfavor Internal Comparisons.

Without authority to support their position, respondents urge that comparative statistics should be preferred over labor market data on the ground that they afford "certainty, simplicity, and ease of use." (Resp. Br. 21, 29.)

Simplicity may lead to clearly erroneous conclusions because the internal work force comparisons tell us nothing about applicant flow or qualifications.³⁶ It leads to rigid quota-based hiring and leaves the employer in total command of the standard by which his practices will be measured.

Authority *u. Beazer*, 440 U.S. 568 (1979), nor *Bazemore u. Friday*, 478 U.S. 385 (1986), dealt with the factual situation here, nor did they hold a labor market analysis was irrelevant. *Teamsters* involved fungible jobs and non-whites were excluded from one. 431 U.S. 324 (1977).

³⁵ *Domingo u. New England Fish Co.*, 445 F. Supp. 421 (W.D. Wash. 1977), *rev'd on other issues*, 727 F.2d 1429, *modified* 742 F.2d 520 (9th Cir.) (1984); *Williams u. Owens Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982); *Markey u. Tenneco Oil Co.*, 635 F.2d 497 (5th Cir. 1981). *Domingo* was a treatment case where because of that employer's practices the findings went the other way. The District Court was, however, obviously troubled by institutional factors. 445 F. Supp. at 433. The Ninth Circuit in this case noted the limited applicability of *Domingo*. (Pet. App. III:18-19, 29-31.) *Williams* and *Markey* confirm that the relevant labor market is a fact issue. 707 F.2d 172, 175 (5th Cir. 1983) (after remand).

³⁶ One author illustrates how comparative statistics can either hide discrimination or show it when none exists. Scanlan, *Illusions of Job Segregation*, 93 The Public Interest 54 (1988).

Respondents say (Resp. Br., p. 29) that this just means employers will discriminate — they miss the point. The vice of the imbalance theory is that it *allows* such behavior as long as the work force is in balance. On the other hand, if the employer exceeds the balance for minorities in one job classification, he does so at his peril. The imbalance theory in effect punishes the socially responsible employer, offers no independent, objective external measure of his practices, and leaves no room for traditional management prerogatives. This is an extraordinarily high price to pay for a theory that promises only "certainty, simplicity, and ease of use."³⁷

C. Instances of Statistical Significance.

Respondents contend that by isolating four job family evaluations from the whole,³⁸ the statistical significance of those groups establishes a *prima facie* case. Resp. Br., 17, 25.³⁹ The four job groups have been selected out of 138 (Reply Br., App. IV), but pure chance could account for this since one would expect two standard deviations in seven out of 138 categories (5%) — even from a nondiscriminatory employer. R.T. 1725, ¶37 (Dr. Wise).

But there were reasons other than chance to explain such deviations. The Court found a lack of cannery worker interest in

³⁷ "Many a promising theory founders on the facts . . . and those in our record demonstrate that word-of-mouth recruitment at this refinery has not proved a discriminatory practice." *Markey, supra*, 707 F.2d at 174.

³⁸ Tender jobs at Red Salmon; machinist and fishermen at Bumble Bee; the tender jobs for Wards Cove and Red Salmon combined ("at WCP").

³⁹ Statistical significance is not the equivalent of legal significance. *EEOC u. Federal Reserve Bank of Richmond*, 698 F.2d 633, 648 (4th Cir. 1983); *Gay u. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 551, 552-55 (9th Cir. 1982) (waiter job). See *Allen u. Prince George's County, Md.*, 737 F.2d 1299, 1307 (4th Cir. 1984) (no liability where four out of eight classifications exceeded two standard deviations); *EEOC u. Western Elec. Co.*, 713 F.2d 1011, 1019-23 (4th Cir. 1983) (age case).

applying⁴⁰ and students (often cannery workers) were not available. There was substantial evidence that Alaska Natives preferred fishing to cannery jobs, including tender jobs (R.T. 2437, 2772; J.A. 163-4). The Native fishermen in Bristol Bay for the most part preferred to fish at Ekuk rather than Bumble Bee (J.A. 179).⁴¹

II. The Causation Gap.

Respondents concede an inability to prove separate causation. They assert that petitioners admitted causation with the "asserted" qualifications and the use of Local 37 for cannery worker jobs. But the petitioners' labor market data showed that elimination of the "skills adjustment" could not change the result. (See *supra*, p. 8.) Neither Local 37 nor hiring from the villages could have any effect on at-issue jobs.⁴² Respondents' contention that proof of causation is not required (Resp. Br. 41) is directly contrary to existing case law. (Pet. Br. 30-33.)

III. Respondents' Proof Does Not Establish an Unrebuttable Presumption.

In respondents' view, an inference of disparate impact can only be defended by proving business necessity as an affirmative defense. They rely on *Griggs* and its progeny.⁴³ The problem in

⁴⁰ This is an absolute defense to segregation claims. Cases cited in Equal Employment Advisory Council Am. Br. p. 14. See *EEOC v. Sears, Roebuck & Co.*, *supra*, n.31 (such lack of interest undermined statistics).

⁴¹ If the native fishermen at CWF-Egegik are added to the Bristol Bay pool for all facilities, the nonwhite percentage of company fishermen rises to 26.63% (Ex. A-403, Table 22). It is logical that they are included. (J.A. 179-80; R.T. 1142, 2861.)

⁴² Respondents do argue that Local 37 has no control over the dispatch. The facts and findings are otherwise, but it is not relevant in an impact case involving *other* jobs in any event.

⁴³ *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

automatically applying such cases at all is that in each the plaintiff had proved a discrete, single, objective, facially neutral employment practice to have actually *caused* the disproportionate exclusion of the protected group.

Though denominated a *prima facie* showing, the *Griggs* proof was much more than that. The *prima facie* case is normally the threshold of evidence which will permit, but not require, the trier of fact to find in plaintiff's favor. *Wright v. Rockefeller*, 376 U.S. 52 (1964). See *Christie v. Callahan*, 124 F.2d 825, 827, 840 (D.C. Cir. 1941). In *Burdine*,⁴⁴ this Court raised the threshold one step further, and held that the *McDonnell Douglas*⁴⁵ elements of proof in a disparate treatment case would create a rebuttable presumption — provided the evidence is believed.⁴⁶

Courts have not extended *prima facie* evidence to the level respondents suggest — an unrebuttable presumption which limits the only defense to an affirmative one.⁴⁷

In each of the decisions of this Court which put an employer to the proof of business necessity, not only had the plaintiff established that an objective, rigidly applied head wind had automatically been applied, but the employers basically admitted it. They chose to defend on the ground that the head wind was

⁴⁴ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

⁴⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁴⁶ This Court identified the two distinct burdens. 450 U.S. at 254. The creation of the rebuttable presumption does not arise until the plaintiff establishes the essential elements of his *McDonnell Douglas* case. Belief and credibility still remain a function exclusively of the trier of fact.

⁴⁷ The plaintiff must always establish the elements of his case. See Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5, 7 (1959). *NLRB v. Transp. Management Corp.*, 462 U.S. 393 (1983), cited by respondents for the proposition that the court may change the burden of persuasion on an issue, expressly holds the plaintiff must prove the elements of his case.

justified, as in *Griggs*, where the employer thought it would simply improve the overall work force.⁴⁸

Respondents' case rests on far weaker grounds; they cannot even prove causation and urge the Court to place that burden on the employer also. There are fundamental and sound reasons why the ultimate burden of persuasion should remain with the plaintiff. It is based on the principles that (1) he who seeks to change the present state of affairs should bear the risk of non-persuasion; and (2) he who denies a fact cannot normally produce any proof.⁴⁹ Here, the respondents seek both to change the state of affairs and to require petitioners to prove the negative of several possible causes of impact: (1) failure to recruit; (2) failure to post; (3) failure to use objective criteria; and (4) failure to promote. (Resp. Br. 25, 40.)

Respondents and their *amici* also contend that the burden should be on the employer to prove lack of causation on grounds that the employer normally maintains the employment records.⁵⁰

⁴⁸ In *New York Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979), the employer defended by attacking plaintiffs' statistics as well.

⁴⁹ E. Cleary, *McCormick on Evidence*, § 337 (3d Ed., 1984); J. Buzzard, 10 *Phipson on Evidence* 36 (12th Ed. 1976); *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.* [1942] A.C. 154.

It is an ancient rule and founded on considerations of good sense and should not be departed from without strong reasons.

Id. at 174. The rule is traced to the era when if a trial by combat ended in a draw, the plaintiff lost. W. Blackstone, 3 *Commentaries*, *340 (1900).

⁵⁰ They also contend that certain application records were destroyed. Petitioners routinely disposed of applications until two years into the case period, when plaintiffs requested them for the first time. R.T. 1143. They were then retained but were not useful since most of them did not contain the race of the applicant. *E.g.*, Ex. 693. Since respondents are involved in a seasonal industry, they are specifically exempt from keeping such records for even six months. 29 C.F.R. 1602.14(b). Nor do the Guidelines have the force of law as respondents contend. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

The court in *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988), Petition for Cert. filed (No. 88-141), states that the employer is in the best position to know. But the same logic can be applied to any tortfeasor: he who collides with a car is in the best position to know if he is negligent but should he have the burden of proving no negligence? The concept is neither practical nor in accordance with existing law.⁵¹

The distinction between a *prima facie* case and an unrebuttable presumption is an important one for it explains the Ninth Circuit's error in this case. The Court of Appeals took the respondents' collective evidence and determined that:

The statistics show *only* racial stratification by job category. This is sufficient to raise an *inference* that some practice or combination of practices has caused the distribution of employees by race and to place the *burden* on the employer to justify the business necessity of the practices identified by the plaintiffs. (Emphasis supplied.)

Pet. App. VI:18. The court, having recognized that the treatment inference created by the totality of respondents' evidence had been rebutted, determined that the same evidence was now unrebuttable. Only the name of the analytic model had changed.

Respondents and their *amici* suggest that an unrebuttable presumption is created at any time imbalance in the work force can be shown, and the burden of proving affirmative defenses extends to each practice named. This is clearly not the teaching of *Griggs*. If indeed respondents did make a *prima facie* showing,⁵² it was answered.

⁵¹ Civil discovery procedures with modern computer aided technology are formidable tools in the hands of a skilled plaintiff's lawyer who can select the information he chooses. Petitioners spent thousands of hours in compiling information answering respondents' first wave of discovery. Routinely, such techniques are employed in a wide variety of complex litigation. *Manual for Complex Litigation* (1986).

⁵² Respondents wrongly contend that the existence of a *prima facie* case cannot be challenged after denial of a motion to dismiss. Denial of such a motion may be discretionary, is only tentative, and does not preclude later findings and determinations inconsistent with it. *Weissinger v. United States*, 423 F.2d 795, 797-798 (5th Cir. 1970); J. Moore, 5 *Federal Practice* § 41.13(4), p. 41-179.

The plurality of this court in *Watson* determined there should be one analytic model in discrimination cases; this case should set forth the elements of a single order of proof to redefine in discrimination cases that a *prima facie* case is subject to rebuttal before the necessity of an affirmative defense.

CONCLUSION

Respondents' imbalance theory of impact should be rejected. It is contrary to law, wholly impractical, and seriously undermines the goals of Title VII. Without it respondents have no case. For the same reasons the Court should reject respondents' business necessity argument and their argument that the impact theory can be used to challenge multiple practices without separate proof of causation.

Respectfully submitted,

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APPENDIX I

PERCENTAGE OF NEW HIRES FROM WASHINGTON, OREGON, AND ALASKA: ALL ALASKA FACILITIES OF DEFENDANTS, EXCEPT ICY CAPE*

	State of Residence:				Percent From Alaska + Washington + Oregon
	<u>Alaska</u>	<u>Oregon</u>	<u>Washington</u>	<u>Other</u>	
Number of New Hires:	3356	943	3694	1610	83.2

* This table is a summary drawn from Exhibits A-63 through A-69, and A-71 through A-74.

APPENDIX II

WHITE PERCENTAGE OF CIVILIAN LABOR FORCE
OVER AGE 18 FROM FARWEST STATES*

	<u>Total Number In Civilian Labor Force</u>	<u>Number of Whites (%)</u>
1. Alaska, Washington, and Oregon	2,204,068	2,122,011 (96.3%)
2. Alaska	98,296	84,970 (86.4%)
Washington	1,295,958	1,246,620 (96.2%)
Oregon	809,814	790,421 (97.6%)
California	<u>7,778,047</u>	<u>7,004,757</u> (89.9%)
Total (AK, WA, OR and CA)	9,992,115	9,126,768 (91.99%)

* This is a summary drawn from Exhibits A-35 (Alaska), Table 53, p.100 (over age 16); A-36 (Washington), Table 46, p.138; A-37 (Oregon), Table 46, p.129; and A-38 (California), Table 46, p.383.

APPENDIX III

NUMBER AND PERCENTAGE OF WHITE AND
MINORITY COMPONENTS OF CIVILIAN LABOR FORCE
IN FARWEST NEEDED TO PRODUCE 5,000 EMPLOYEES
PER YEAR FOR SALMON INDUSTRY

1. *Assumed Facts:* Entire civilian labor force in geographical area drawn on by defendants is 89% white, 11% nonwhite (non-white: 4% Filipino and Alaska Native; 7% Asian and other Minority). Exhibit A-281, Labor Pool Table 5b, Col. "All Departments"*. (Unweighted, the percent white is greater than 91%. See Reply Br. App. II and Exhibits A-35 through A-38.) The civilian labor force numbers approximately 10 million persons. Reply Br. App. II. Thus, there are 8.9 million whites and 1.1 million nonwhite (400,000 Filipino and Alaska Native; 700,000 Asian and Other Minority).

The industry will employ 5,000 persons (testimony Dr. Smith) and the number of whites and nonwhites who would make themselves available for those 5,000 is equal. That is, Dr. Flanagan's theory that the labor supply is 50% nonwhite is assumed. Thus, it will take 2,500 whites and 2,500 nonwhites to fill the industry jobs.

2. *Comparison of White vs. NonWhite:* 2,500 of 8.9 million whites and 2,500 out of 1.1 million nonwhites are "available". That is, .028 percent of whites are available, but .22 percent of nonwhites are available.

The ratio of nonwhites to whites is .22 percent divided by .028 percent equals 7.85. That is, nonwhites are approximately eight times as likely as whites to take the jobs in a freely competitive labor market under Dr. Flanagan's theory.

3. *Comparison of Whites to Filipinos and Alaska Natives Combined:* Assuming that between them Filipinos and Alaska

* This table uses no skill differentiation ("all workers"), the broadest availability class ("everyone in work force") and weighting based on plaintiffs' preferred method of counting, "All Hires". The percent white is slightly higher in Exhibit A-278 ("New Seasonal" Hires).

APPENDIX III (continued)

Natives constitute 4/5 of the 2,500 minorities who would be available under plaintiffs' theory (Exhibit 631; Exhibit A-406, Table 34, Row "All Jobs"), then it would take 2,000 of the 400,000 Filipinos and Alaska Natives in the civilian labor force to fill slots under Dr. Flanagan's theory. That is, .5 percent of the total number of Filipinos and Alaska Natives in the civilian labor force are "available".

The ratio of Filipinos and Alaska Natives to Whites is .5 percent divided by .028 percent equals 17.85. That is, Filipinos and Alaska Natives are approximately 18 times as likely as whites to take the salmon canning jobs in a freely competitive labor market under Dr. Flanagan's theory.

APPENDIX IV

**INSTANCES OF STATISTICALLY SIGNIFICANT
UNDERREPRESENTATION OF NONWHITES IN AT-ISSUE
JOBS IN PETITIONERS' LABOR MARKET ANALYSIS***

Name of Cannery or Combination of Facilities	No. of At Issue Job Families Evaluated**	Number Showing GREATER THAN 1.96 Std. Dev.	Number Showing LESS THAN 1.96 Std. Dev.
Wards Cove	8	0	8
Red Salmon	11	1	10
Alitak	11	0	11
Ekuk	11	0	11
South Naknek	12	2	10
Wards Cove & Red Salmon	11	1	10
WCP Interests (Class Facilities)	12	0	12
WCP Interests (All Alaska Operations except Icy Cape)	13	0	13
CWF (Alitak & Ekuk)	11	0	11
CWF (Alaska Operations except Icy Cape)	13	0	13
Castle & Cooke Interests (Class Facilities)	12	0	12
Castle & Cooke Interests (All Alaska Operations except Icy Cape)	13	0	13
TOTAL	138	4	134

* This is a summary drawn from Ex. A-278, Table 4 for each Tab.

** Job families, including "at issue combined", with one or more employees.